STATE OF MICHIGAN

COURT OF APPEALS

JEFFREY BROOKSHIRE, Personal Representative of the Estate of JEANNETTE BROOKSHIRE, Deceased,

Plaintiff-Appellee,

v

BHARTIBEN PATEL, M.D., PATEL INTERNAL MEDICINE ASSOCIATES, P.C., KELLY MANDAGERE, M.D., ANN ARBOR ENDOCRINOLOGY & DIABETES ASSOCIATES, P.C., NANCYLEE STIER, M.D., ANN ARBOR INPATIENT PHYSICIANS, P.L.L.C., and ROBERT URBANIC, M.D.,

Defendants-Appellants,

and

TRINITY HEALTH—MICHIGAN, d/b/a ST. JOSEPH MERCY HOSPITAL, f/k/a MERCY HEALTH SERVICES,

Defendant.

UNPUBLISHED
March 15, 2007

No. 257214
Washtenaw Circuit Court
LC No. 03-000731-NH

JEFFREY BROOKSHIRE, Personal Representative of the Estate of JEANNETTE BROOKSHIRE, Deceased,

Plaintiff-Appellee,

v

BHARTIBEN PATEL, M.D., PATEL INTERNAL MEDICINE ASSOCIATES, P.C., KELLY MANDAGERE, M.D., ANN ARBOR ENDOCRINOLOGY & DIABETES ASSOCIATES, P.C., NANCYLEE STIER, M.D.,

No. 257629
Washtenaw Circuit Court
LC No. 03-000731-NH

ANN ARBOR INPATIENT PHYSICIANS, P.L.L.C., and ROBERT URBANIC, M.D.,

Defendants,

and

TRINITY HEALTH—MICHIGAN, d/b/a ST. JOSEPH MERCY HOSPITAL, f/k/a MERCY HEALTH SERVICES,

Defendant-Appellant.

Before: Servitto, P.J., and Talbot and Schuette, JJ.

PER CURIAM.

In these consolidated appeals, defendants appeal by leave granted, challenging a circuit court order denying their motions for summary disposition pursuant to MCR 2.116(C)(7) (statute of limitations). We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

We review de novo the circuit court's summary disposition ruling. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

> Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by the statute of limitations. In determining whether summary disposition was properly granted under MCR 2.116(C)(7), this Court "consider(s) all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." [*Waltz v Wyse*, 469 Mich 642, 647-648; 677 NW2d 813 (2004), quoting *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001).]

"Whether a period of limitation applies to preclude a party's pursuit of an action [also] constitutes a question of law that we review de novo." *Detroit v 19675 Hasse*, 258 Mich App 438, 444; 671 NW2d 150 (2003).

The parties dispute whether plaintiff's provision of notice of his intent to sue defendants, as required by MCL 600.2912b, tolled the applicable period for filing this wrongful death medical malpractice action. In *Waltz*, *supra* at 648-651, 655, the Michigan Supreme Court held that under the clear and unambiguous language of MCL 600.5856, the filing of a notice of intent to sue during the two-year malpractice period of limitation in MCL 600.5805(6) operates to toll this period, but that the giving of notice does not toll the period in MCL 600.5852, which constitutes a wrongful death *saving period*, "an *exception* to the limitation period" and not a period of limitation itself. (Emphasis in original). In *Mullins v St Joseph Mercy Hosp*, 271 Mich App 503, 509; 722 NW2d 666 (2006), lv pending, a special conflict panel of this Court concluded that the Supreme Court's decision in *Waltz* "applies retroactively in all cases."

More recently, in *Ward v Siano*, 272 Mich App 715; ___ NW2d ___ (2006), slip op at 1-3, lv pending, another special conflict panel rejected the proposition that "a wrongful death plaintiff may rely upon equitable tolling to escape the retroactive effect of our Supreme Court's decision in *Waltz v Wyse*."

In this case, the decedent's claims accrued at the latest by October 16, 2000, the date of her death, and thus the two-year period of limitation in MCL 600.5805(6) extended through October 16, 2002, at the latest. Plaintiff's appointment as personal representative on January 30, 2001, gave him until January 30, 2003, to commence this action within the wrongful death saving period. MCL 600.5852. Plaintiff gave notice of his intent to sue defendants on December 23, 2002, but this notice did not toll the wrongful death saving period pursuant to MCL 600.5856(c). *Waltz*, *supra* at 648-651, 655.[1] Consequently, plaintiff's filing of this action on July 7, 2003, occurred more than five months after the wrongful death saving period had expired.

Plaintiff suggests that retroactively applying *Waltz* violates due process guarantees by significantly shortening the period of limitation governing this case *after* he filed the complaint. Our Supreme Court and this Court have rejected this argument. *Waltz*, *supra* at 652 n 14; *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 576 n 27; 703 NW2d 115 (2005); *Ousley v McLaren*, 264 Mich App 486, 496; 691 NW2d 817 (2004).

Plaintiff additionally suggests that according to the interpretation of MCL 600.5852 in *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29; 658 NW2d 139 (2003), the complaint qualifies as timely by virtue of the appointment of Randall Brookshire as the successor personal representative of the decedent's estate on June 21, 2004.[2] In *McMiddleton v Bolling*, 267 Mich App 667, 668; 705 NW2d 720 (2005), this Court "h[e]ld that the appointment of a successor personal representative cannot revive a complaint that the predecessor personal representative filed more than two years after being appointed." The Court distinguished *Eggleston* as follows:

> In *Eggleston*, the personal representative died before a complaint was filed. A successor personal representative was then appointed. The issue was whether the two-year saving provision began to run from the appointment of the

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[1] This Court has rejected plaintiff's contention that his giving of notice within the two-year period in MCL 600.5852 tolled this wrongful death saving period because he subsequently and timely filed suit within the three-year time limit also referenced in § 5852. "[T]he three-year ceiling in the wrongful death saving provision is not an independent period in which to file suit; it is only a limitation on the two-year saving provision itself. Therefore, the fact that the three-year ceiling was not yet reached when [the plaintiff] filed suit is irrelevant." *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 575; 703 NW2d 115 (2005).

[2] Plaintiff raised this claim in the circuit court, but the court did not address it. Although the issue is unpreserved, this Court nonetheless may address it on appeal because it involves a question of law. *Michigan Twp Participating Plan v Fed Ins Co*, 233 Mich App 422, 435-436; 592 NW2d 760 (1999).

> original personal representative or the appointment of the successor personal representative. Our Supreme Court held that MCL 600.5852 "clearly allows an action to be brought within two years after letters of authority are issued to the personal representative. The statute does not provide that the two-year period is measured from the date the letters of authority are issued to the initial personal representative." *Id*. at 33. Plaintiff argues that according to this decision, she *could* have filed a complaint two years after she was appointed successor personal representative. [Emphasis in original.] *However, after being appointed successor personal representative, she did not file a complaint. . . . The original personal representative filed the complaint approximately two years and six months after her appointment. The successor personal representative never filed a complaint.* [Emphasis added.] Thus, *Eggleston* does not support the conclusion that the complaint in this case was timely filed.
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> Plaintiff contends that she did not need to file another complaint, because the previous personal representative had already filed one. However, applying MCL 600.5852 and the Supreme Court's ruling in *Eggleston*, it is clear that a successor personal representative cannot rely on the untimely filed complaint that was filed before she was appointed. [*McMiddleton*, *supra* at 672-673.]

In light of the instant facts that plaintiff, the original personal representative, untimely commenced this action, and that Randall Brookshire, the successor personal representative, never took steps toward filing a second complaint on behalf of the estate, we conclude that Randall Brookshire's mere appointment as the successor "cannot revive [the] complaint that the predecessor personal representative filed more than two years after being appointed." *Id*. at 668.

In summary, because the holding in *Waltz* retroactively applies to this case according to *Mullins*, *supra* at 509, and because this Court in *Ward*, *supra*, slip op at 1-3, precluded the applicability of the equitable or judicial tolling doctrine under the circumstances of this case, the circuit court erred by denying defendants' motions for summary disposition pursuant to MCR 2.116(C)(7).

Reversed and remanded for entry of an order granting defendants' motions for summary disposition. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Michael J. Talbot
/s/ Bill Schuette